

STEPHAN E. KYLE (SBN 158075)
KYLE LAW CORPORATION
465 California Street, 5th Floor
San Francisco, CA 94104
Telephone: (415) 839-8100
Facsimile: (415) 839-8189

Attorneys for Plaintiff
JASON EVERETT THOMPSON

**IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION**

In re:
DEAN GREGORY ASIMOS,
Debtor.

Case No.: 11-13214-AJ

Chapter 7

Adv. Case No. 14-01018 CN

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT OF JASON EVERETT
THOMPSON**

JASON EVERETT THOMPSON,
Plaintiff,
v.
DEAN GREGORY ASIMOS,
Defendant.

Date: November 4, 2010
Time: 11:00 a.m.
Location: 99 South E Street
Santa Rosa, California

Judge: Hon. Charles Novak

Jason Everett Thompson (“Plaintiff” or “Thompson”), plaintiff, and creditor of the above-named debtor, Dean Gregory Asimos (“Debtor, “Defendant” or "Defendant Asimos") hereby submits the following memorandum in support of his motion for summary judgment (the “Motion”), for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure (the “Fed. R. Civ. P.”), as incorporated herein pursuant to Rule 7056 of the Federal Rules of Bankruptcy

1 Procedure (the “Bankruptcy Rules”), granting summary judgment against the Defendant
2 Asimos and rendering a determination of nondischargeability or a declaration that certain debts,
3 as set forth herein, of Defendant Asimos that have arisen since the filing Chapter 13 Petition are
4 not subject to the discharge order.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

-ii-

IN RE: DEAN GREGORY ASIMOS
AD CASE NO. 14-01018 CN

Case: 14-01018 Doc# 73-1 Filed: 09/30/20 Entered: 09/30/20 11:49:51 Page 2 of 21

TABLE OF CONTENTS

I.	SUMMARY OF ARGUMENT	1
II.	RELIEF REQUESTED.....	1
III.	STATEMENT OF UNDISPUTED FACTS AND PROCEDURAL HISTORY	2
A.	The Pre-Petition Events.....	2
1.	The Parties Failed Business Relationship and the Contra Costa Superior Court Action.....	2
2.	Defendant Asimos Files the Chapter 13 Petition	3
B.	Post-Petition Events	4
1.	The San Francisco Superior Court Action – Defendant Asimos Pursues Damages and Attorneys’ Fees Against Plaintiff.....	4
2.	The Chapter 7 Conversion and Discharge	5
C.	The Post-Discharge Events – Defendant Asimos “Returns to the Fray”	6
1.	Defendant Asimos Files and Prosecutes an Appeal Rather After The Discharge Is Entered.....	6
2.	Defendant Asimos’ Refusal to Comply with the Permanent Injunction Leading to a Contempt Judgment Against Him	7
3.	Defendant Asimos Files A Second Appeal.....	8
IV.	ARGUMENT	9
A.	Legal Standard	9
1.	Summary Judgment.....	9
B.	Plaintiff Is Entitled to A Declaration of Rights (1) That His Claims Were Not Discharged In The Case And (2) Any Efforts To Collect On Those Claims Does Not Violate The Discharge Injunction of 11 U.S.C. § 524.....	9
1.	Defendant Asimos Voluntarily Pursued Litigation Post-Petition	9
2.	Post-Petition Debts Are Not Discharged in Chapter 7 Cases	10
3.	Post-Discharge Debts Are Not Discharged in Chapter 7 Cases.....	12
C.	Plaintiff Is Also Entitled To A Determination That Defendant Asimos’ Debt to Plaintiff Is Not Dischargeable Pursuant to 11 U.S.C. §523(a)(6))	14

1	1.	Defendant Asimos' Violation of the Permanent Injunction was Willful and Malicious	14
2	2.	The Contempt Judgment and the Second Appeal Attorney Fee Award Are Not Dischargeable Under Section 523(a)(6).....	15
3	3.	Defendant Asimos Is Bound By the Actions Taken By His Counsel.....	15
4	V.	CONCLUSION.....	15
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

1 TABLE OF AUTHORITIES

2 Cases

3 <i>Boeing North American, Inc. v. Ybarra (In re Ybarra)</i> , 424 F. 3d 1018 (9th Cir. 2005)	9, 10, 12
4 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).....	9
5 <i>In re Allison</i> , 176 B.R. 60, 64 (Bkrtcy. S.D. Fla. 1994).....	14
6 <i>In re Gillespie</i> , 516 B.R. 586, 592 (9th Cir. BAP 2014).....	10
7 <i>In re Oracle Corp. Sec. Litigation</i> , 627 F.3d 376, 387 (9th Cir. 2010)	9
8 <i>In re Suarez</i> , 400 B.R. 732, 740 (9 th Cir. 2009).....	15
9 <i>Kawaauhau v. Geiger (In re Geiger)</i> , 523 U.S. 57 (1998)	14
10 <i>Link v. Wabash R. Co.</i> , 370 U.S. 626, 634 (1962)	15
11 <i>Matsushita Elec. Indus Co. v. Zenith Radio Corp.</i> , 475 U.S. 574, 586 (1986).....	9
12 <i>McDowell v. Stein</i> , 415 B.R. 584, 600 (S.D. Fla. 2009)	14, 15
13 <i>Richards v. Nielsen Freight Lines</i> , 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985)	9
14 <i>Roussos v. Michaelides (In re Roussos)</i> , 251 B.R. 86, 91 (9th Cir. BAP 2000).....	9
15 <i>Sherwood Park Business Center, LLC v. Taggart</i> , 267 Or.App. 217, 341 P. 3d 96 (Or.App. 2014)	10
16 <i>Siegel v. Federal Home Loan Mortgage Corp.</i> , 143 F.3d 525, 533- 34 (9 th Cir. 1998)	9, 12

17 Statutes

18 11 U.S.C. § 524	9
19 11 U.S.C. § 523(a)(6).....	1
20 Fed. R. Bankr. P. 7056	9
21 Fed. R. Civ. P. 56(c).....	9

1 **I. SUMMARY OF ARGUMENT**

2
3 Plaintiff was forced to defend years of litigation and necessarily incurred hundreds of
4 thousands of dollars in attorneys' fees and costs directly related to Defendant Asimos bad faith
5 litigation tactics. Plaintiff has already acknowledged by the filing of his First Amended
6 Complaint that the underlying Business Damages Judgment arising out of the failed, pre-
7 petition business relationship with Defendant Asimos constitutes a discharged debt under the
8 Chapter 7 Discharge. To be clear, Plaintiff's claims here are limited to the damages caused to
9 him by Defendant Asimos' post-petition and, in many cases, post-Discharge litigation efforts
10 against him wherein Defendant Asimos (i) instituted new litigation against Plaintiff post-
11 petition, (ii) subsequently "returned to the fray" post-Discharge by filing an appeal seeking
12 affirmative relief, and (iii) violated valid orders of the Superior Court leading to a Judgment of
13 Contempt and multiple attorneys' fees awards against him.

14 Plaintiff asserts that attorneys' fees and costs caused by Defendant Asimos' post-petition
15 and post-Discharge litigation conduct are properly excluded from the scope of the Chapter 7
16 Discharge since the discharge shield may not be used as a sword that enables a debtor to
17 undertake risk-free [post-petition] litigation at others' expense.

18 Plaintiff further asserts that Defendant Asimos acted willfully and maliciously toward
19 Plaintiff and caused him significant damage (i) by concealing the Chapter 13 petition from
20 Plaintiff and the San Francisco Superior Court, (ii) by refusing to comply with a valid court
21 order issued against him in the form of a Permanent Injunction, (iii) by forcing Plaintiff to
22 institute and prosecute Contempt proceedings against him, and (iv) by forcing Plaintiff to
23 defend a second meritless appeal related to the Judgment of Contempt against him. Plaintiff
24 contends that such debts are nondischargeable by virtue of the provisions of 11 U.S.C. §
25 523(a)(6).

26 **II. RELIEF REQUESTED**

27 By way of this motion, and in light of the undisputed facts in this case, Plaintiff seeks the

1 following:

2 (1) A declaration that Plaintiff's state court Judgment of Contempt, First Appeal
3 Attorney Fee Award, Second Appeal Attorney Fee Award, Contract Attorney Fee Award and
4 Court Cost Award (each as defined further below) each do not seek to impose liability on
5 Defendant Asimos for any debt discharged in the Case;

6 (2) A declaration that further prosecution of the San Francisco Action against Defendant
7 Asimos pursuant to the orders and remittitur issued by the California Court of Appeal in the
8 First Appeal and Second Appeal, and the subsequent orders of the trial court in the San
9 Francisco Action, including obtaining a final judgment therein and collecting on that judgment,
10 does not violate the discharge injunction; and

11 (3) A determination that these debts are nondischargeable by virtue of the provisions of
12 11 U.S.C. § 523(a)(6) as a consequence of Defendant Asimos willful and malicious conduct.

14 **III. STATEMENT OF UNDISPUTED FACTS AND PROCEDURAL HISTORY**

15 The parties have submitted concurrently herewith a Joint Stipulation Of Facts In Support Of
16 their Cross-Motions For Summary Judgment, which will be referenced as "JSF" herein.

17 **A. The Pre-Petition Events**

18 **1. The Parties Failed Business Relationship and the Contra Costa Superior Court Action**

19 Plaintiff and Defendant were parties to a business relationship from which they both
20 stood to gain. The relationship would enable Plaintiff to benefit from Defendant Asimos' status
21 as a licensed real estate broker by complementing his existing consulting business with
22 commission-based transactions regulated by the Department of Real Estate. Defendant Asimos
23 would benefit from Plaintiff's consulting business in the high-tech industry by exposure to an
24 emerging field of high-tech commercial real estate through Plaintiff's pre-existing business
25 contacts and experience. [JSF ¶ 1]. Such benefits were dependent, of course, on both parties
26 fulfilling their contractual obligations.

27 During the course of the business relationship, one of Plaintiff's client's disputed
28

1 payment of a large commission, resulting in Asimos becoming plaintiff in the action Dean
2 Asimos dba Wired Real Estate Group v. Astound Broadband, LLC, et al., filed on October 23,
3 2009 in Contra Costa County Superior Court as Case No. C09-02957 (hereinafter, “the Contra
4 Costa County Action”). [JSF ¶ 2].

5 Plaintiff contended that the client’s refusal to pay the commission resulted because
6 Defendant Asimos failed to register Plaintiff’s business name, Wired Real Estate Group, as a
7 dba with the Department of Real Estate, as Plaintiff contended he was statutorily required to do.
8 [JSF ¶5, Exhibit 1 - Complaint at ¶ 44].

9 The Parties ultimately settled the Contra Costa County action and the case was dismissed
10 on June 6, 2011. Very soon thereafter, the settlement funds, net of litigation costs and
11 contingency fees, totaling in excess of \$100,000 were deposited into the Trust Account of Carr,
12 McClellan, Ingersoll, Thompson & Horn Professional Law Corporation, the attorneys for the
13 Parties (“Trust Account”). [JSF ¶ 3].

14 **2. Defendant Asimos Files the Chapter 13 Petition**

15 Debtor Dean Gregory Asimos subsequently filed a voluntary petition for Chapter 13
16 Bankruptcy in this Court on or about August 29, 2011 (the “Chapter 13 Petition”) and the
17 Amended Chapter 13 Plan for which was confirmed by this court on March 2, 2012. [JSF ¶ 4].

18 From a review of Defendant Asimos’ filings in the Chapter 13 case, the record is devoid
19 of any disclosure by Asimos to this Court or the Chapter 13 Trustee that he had in fact entered
20 into a Settlement Agreement on May 25, 2011 in the Contra Costa Action for an amount in
21 excess of \$100,000. Further, there is no evidence that Asimos ever disclosed to this Court or
22 the Chapter 13 Trustee that the settlement funds from the Contra Costa Action were already
23 sitting in the Trust Account for the Parties and that Asimos claimed entitlement to those funds.
24 [JSF ¶ 6, Exhibit 2 – Asimos Cross-Complaint; Declaration of Stephan E. Kyle (“Kyle Decl.”)
25 submitted herewith at ¶¶ 6-7].

B. Post-Petition Events

1. The San Francisco Superior Court Action – Defendant Asimos Pursues Damages and Attorneys’ Fees Against Plaintiff

Shortly after the Chapter 13 Petition was filed, unbeknownst to him, Plaintiff filed the action *Thompson v. Asimos* (San Francisco Superior Court Action No. CGC-11-514980)(hereinafter “the San Francisco Action”) against Defendant Asimos on October 11, 2011 alleging various causes of action arising out of the failed business relationship between them, including Trademark Infringement, Unfair Competition (Lanham Act), Unfair Competition (Cal. Bus. & Prof. Code), Injury To Business Reputation, False Description, Breach Of Contract, and Declaratory Relief. [JSF ¶5, Exhibit 1 – Complaint].

Rather than notify Plaintiff and the San Francisco Superior Court of the Chapter 13 Petition in order to invoke the automatic stay, Defendant Asimos instead went on the offense and filed a counter-suit against Plaintiff in the San Francisco Action on November 30, 2011, alleging multiple claims for damages against Plaintiff, including Breach of Contract, Breach of Good Faith and Fair Dealing, Accounting, Fraud and Concealment, and Constructive Trust. [JSF ¶ 6, Exhibit 2 – Asimos Cross-Complaint].

On February 23, 2012, in anticipation of the First Case Management Conference in the San Francisco Action, Asimos filed a case management conference statement. Section 12 and 13 of the case management conference statement required the party to list any related cases or bankruptcy proceedings. Asimos failed to disclose, and concealed from the San Francisco Superior Court and from Plaintiff, that the Chapter 13 Petition had been filed. [Kyle Decl. ¶ 5, Exhibit 13 - CMC Statement]. Defendant Asimos was represented by counsel in the San Francisco Action. [JSF ¶ 8].

Further, as noted above, there is no evidence that Defendant Asimos notified the Chapter 13 Trustee of the lawsuit that had been filed and the counter-suit he had filed against Plaintiff seeking damages and attorneys' fees in the San Francisco Action. Kyle Decl. ¶¶ 6-7.

Litigation on the Complaint and Asimos Cross-Complaint in the San Francisco Action continued for months without any disclosure by Defendant Asimos regarding his Chapter 13

Petition filing. Defendant Asimos' deposition was taken in the San Francisco Action less than 30 days before trial. During his deposition under oath, Defendant Asimos finally disclosed to Plaintiff's attorney that he had filed a Chapter 13 Bankruptcy petition over a year earlier. [JSF ¶ 9].

Upon learning of the bankruptcy, Plaintiff immediately notified the Chapter 13 Trustee and this Court of the pending litigation between the Parties and the more than \$100,000 in funds held in trust for the Parties. Per a stipulation filed with this Court and subsequent order, the Parties were granted leave from the Bankruptcy Code's automatic stay and the San Francisco Action proceeded to trial. [JSF ¶ 10; Kyle Decl. ¶¶ 6-7].

A bench trial was then held in the San Francisco Action over the course of several days in October of 2012. Ultimately, judgment was entered against Defendant Asimos on August 23, 2013. The Court rejected each of the claims alleged by Defendant Asimos in his Cross-complaint and awarded Plaintiff a monetary judgment on his claims in the sum of amount of \$450,038 (the "Business Damages Judgment") plus additional attorney's fees and costs in the amount of \$181,250 (the "Contract Attorney Fee Award") and court costs in the amount of \$9,185.45 (the "Court Cost Award"). The Court also issued a Permanent Injunction against Defendant requiring him to "sign immediately any documents reasonably necessary to effectuate the distribution" to Plaintiff of the settlement monies in the Trust Account stemming from the settlement of the Contra Costa Action (the "Permanent Injunction"). [JSF ¶ 11, Exhibit 3 – Business Damages Judgment, Exhibit 4 – Contract Attorney Fee Award, Exhibit 5 – Court Cost Award, and Exhibit 6 – Permanent Injunction].

2. The Chapter 7 Conversion and Discharge

Shortly after Judgment was entered in favor of Plaintiff in the San Francisco Action, Defendant Asimos converted his Chapter 13 case to one under Chapter 7 on October 10, 2013. [JSF ¶ 12].

This Court entered Defendant Asimos' discharge on May 19, 2014 (the "Discharge") and subsequently closed the main bankruptcy case on June 11, 2014. Asimos' chapter 7

1 proceeding was determined to be a “no-asset” bankruptcy. [JSF ¶ 13].

2 **C. The Post-Discharge Events – Defendant Asimos “Returns to the Fray”**

3 **1. Defendant Asimos Files and Prosecutes an Appeal Rather After
4 The Discharge Is Entered**

5 After the conversion of his bankruptcy case to one under Chapter 7, Defendant Asimos
6 filed an appeal in the California Court of Appeal, First Appellate District on October 23, 2013
7 (Court of Appeal Case No. A140096), whereby he appealed the Business Damages Judgment
8 and the Contract Attorney Fee Award (the “First Appeal”). [JSF ¶ 14].

9 Rather than rely on the Discharge, Defendant Asimos went back on the offensive in the
10 First Appeal. Defendant Asimos did not only seek to have the Judgment against him reversed,
11 he also sought affirmative relief in the First Appeal and requested that the Court of Appeal enter
12 judgment “in favor of Asimos on his breach of contract action and his action for an accounting.”
13 [JSF ¶ 17, Exhibit 7 – Asimos Opening Brief on Appeal at p. 35, *et seq.*]. Plaintiff was required
14 to defend the First Appeal in order to avoid the potential outcome of a money judgment being
15 entered against him by the Court of Appeal, as was being requested by Defendant Asimos.

16 Defendant’s offensive posture in the First Appeal is further articulated in the Reply Brief
17 in the First Appeal filed on behalf of Asimos on January 12, 2015. [JSF ¶ 18, Exhibit 8 –
18 Asimos Reply Brief on Appeal]. The conclusion in the Reply Brief makes clear Defendant
19 Asimos’ affirmative actions to recover damages and attorneys’ fees under the contract between
20 the parties, and states:

21 Appellant has been so severely prejudiced by the faulty decision below
22 that not only is he entitled to reversal, but he is also entitled to costs
23 and attorney’s fees on appeal and for the trial below under the contracts.

24 [JSF Exhibit 8 at p. 28].

25 Defendant Asimos was represented by counsel in the First Appeal. [JSF ¶ 16].

26 On December 15, 2016, the California Court of Appeal filed its decision in the First
27 Appeal, which, among other things, remanded the case to the trial court for a further
28 determination on damages. [JSF ¶ 19].

1 On February 22, 2017, the California Court of Appeal issued its remittitur in the First
2 Appeal and the decision of the Court became final, thereby restoring the trial court's jurisdiction
3 over the matter such that it could, on remand, render a further determination on damages as well
4 as hear further motions filed by the parties in connection therewith. [JSF ¶ 20].

5 On June 7, 2017, the San Francisco Superior Court entered an order awarding further
6 attorneys' fees to Plaintiff in connection with the First Appeal in the amount of \$74,911.50 (the
7 "First Appeal Attorney Fee Award"). The trial court also denied a counter-motion filed by
8 Defendant's attorney for requested attorneys' fees incurred in the First Appeal. [JSF ¶ 21,
9 Exhibit 9 - Order granting the First Appeal Attorney Fee Award].

10 **2. Defendant Asimos' Refusal to Comply with the Permanent
11 Injunction Leading to a Contempt Judgment Against Him**

12 Meanwhile, Defendant Asimos continued to refuse to sign the documentation needed in
13 order to release the settlement monies from the Trust Account to Plaintiff. As a result, Plaintiff
14 was forced to initiate contempt proceedings in the San Francisco Superior Court against
15 Defendant Asimos in August 2015 asserting that Defendant failed to comply with the
16 requirements of the Permanent Injunction. [JSF ¶ 22; Kyle Decl. ¶¶ 8-32].

17 The San Francisco Superior Court entered its judgment of contempt against Defendant
18 Asimos on November 13, 2015, after multiple hearings, and subsequently ordered Mr. Asimos
19 to pay reasonable attorneys' fees in the amount of \$62,785.37 to Plaintiff (the "Judgment of
20 Contempt"). [Kyle Decl. ¶¶ 8-32]. In finding Defendant Asimos guilty of contempt of court,
21 the Court made the following findings, "**beyond a reasonable doubt:**"

- 22 1. That Contemnor is guilty of contempt of court, beyond a reasonable
23 doubt, in violation of California Code of Civil Procedure Section
24 1209(a)(5) for disobedience of a lawful judgment, order or process of
the court;
- 25 2. That Contemnor had knowledge of the Permanent Injunction, was
26 able to comply at the time of the Permanent Injunction and continued
to have such ability, and willfully failed to comply with the Permanent
Injunction;
- 27 28 3. That Contemnor is sentenced to ...

1 a. Pay a fine to the Court in the amount of One Thousand Dollars
2 (\$1,000). . . .

3 b. Pay to Plaintiffs the attorneys' fees and costs incurred in initiating
4 and prosecuting the contempt charge against Contemnor pursuant to
5 appropriate motion filed.

6 [JSF ¶ 25, Exhibit 10 – Judgment of Contempt; Exhibit 11 – Order awarding attorneys' fees].

7 Defendant Asimos was represented by counsel in the Contempt Proceedings.

8 **3. Defendant Asimos Files A Second Appeal**

9 Defendant Asimos then filed a second appeal in the California Court of Appeal, First
10 Appellate District (Court of Appeal Case No. A147960) on March 2, 2016 (the “Second
11 Appeal”) arising out of the same trial court action, wherein he appealed the attorney fee award
12 in connection with the Judgment Of Contempt. [JSF ¶ 26].

13 Defendant Asimos was represented by counsel in the Second Appeal. [JSF ¶ 28].

14 On September 5, 2018, the California Court of Appeal filed its decision on the Second
15 Appeal which affirmed the trial court’s February 24, 2016 Order. Remittitur was issued on
16 November 16, 2018. [JSF ¶ 29].

17 On February 1, 2019, the trial court entered an order awarding further attorneys' fees to
18 Plaintiff in connection with the Second Appeal in the amount of \$55,808.00 (the “Second
19 Appeal Attorney Fee Award”). [JSF ¶ 30].

20 In light of these facts, the majority of which are jointly stipulated, Plaintiff now seeks a
21 determination of nondischargeability or a declaration of rights with respect to the scope of the
22 Discharge with respect to certain debts of Defendant Asimos that have arisen since the filing
23 Chapter 13 Petition, specifically, (1) the Contract Attorney Fee Award, (2) the Court Cost
24 Award, (3) the Judgment of Contempt, (4) the First Appeal Attorney Fee Award and (5) the
25 Second Appeal Attorney Fee Award.

26
27
28
**Kyle
Law
Corporation**

1 **IV. ARGUMENT**

2 **A. Legal Standard**

3 **1. Summary Judgment**

4 Summary judgment is appropriate if there is no genuine issue as to any material fact and
5 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr.
6 P. 7056; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

7 The moving party “initially bears the burden of proving the absence of a genuine issue of
8 material fact.” *In re Oracle Corp. Sec. Litigation*, 627 F.3d 376, 387 (9th Cir. 2010). If the
9 moving party meets its initial responsibility, the burden then shifts to the opposing party to
10 establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus.*
11 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “It is the opposing party’s obligation to
12 establish facts from which the inference may be drawn. See *Richards v. Nielsen Freight Lines*,
13 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir. 1987). “A
14 properly-supported summary judgment motion cannot be defeated by the mere existence of
15 some alleged factual dispute.” *Roussos v. Michaelides (In re Roussos)*, 251 B.R. 86, 91 (9th Cir.
16 BAP 2000).

17 **B. Plaintiff Is Entitled to A Declaration of Rights (1) That His Claims Were Not
18 Discharged In The Case And (2) Any Efforts To Collect On Those Claims
19 Does Not Violate The Discharge Injunction of 11 U.S.C. § 524.**

20 **1. Defendant Asimos Voluntarily Pursued Litigation Post-Petition**

21 Pursuant to prevailing law in the Ninth Circuit, while bankruptcy protects a debtor from past
22 acts, the debtor may not - without consequences - either initiate litigation post-petition or “return to
23 the fray” to continue pre-petition litigation. *Boeing North American, Inc. v. Ybarra (In re Ybarra)*,
24 424 F. 3d 1018 (9th Cir. 2005).

25 In reaching its decision, the *Ybarra* court relied on its earlier decision in *Siegel v. Federal*
26 *Home Loan Mortgage Corp.*, 143 F.3d 525, 533- 34 (9th Cir. 1998), where the debtor commenced

litigation post-petition. On this point, the *Ybarra* court stated: “Even if a cause of action arose pre-petition, the discharge shield cannot be used as a sword that enables a debtor to undertake risk-free [post-petition] litigation at others' expense.” *Ybarra* at 101126. Thus, “post-petition attorney fee awards are not discharged where post-petition, the debtor voluntarily ‘pursue[d] a whole new course of litigation,’ commenced litigation, or ‘return[ed] to the fray’ voluntarily.” *Id.* at 1024 (quoting *Siegel*, 143 F.3d 525, 533–34.)

A 2014 case decided by the Oregon Court of Appeals explained the *Siegel* and *Ybarra* rule in the context of a contractual attorneys' fees claim. *See, Sherwood Park Business Center, LLC v. Taggart*, 267 Or.App. 217, 341 P. 3d 96 (Or.App. 2014). The *Taggart* court explained:

Whether attorney fees and costs incurred through the continued prosecution of litigation initiated pre-petition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a prepetition claim and thereby has risked the liability of these litigation expenses. [Ybarra] at 1026; *see In re Gillespie*, 516 B.R. 586, 592 (9th Cir. BAP 2014) (applying rule from Ybarra to conclude that the debtor was “not entitled to a discharge of * * * postpetition attorney fees” where the debtor “chose to resume his participation in the state court action postpetition in order to preserve his * * * asserted interest in the collateral, in his cross-claims, and in his defenses to [the other party's] claims”).

Taggart at 341 P3d 103.

As set forth below, Defendant Asimos should not be permitted here to use the Discharge as a “sword” to undertake risk-free post-petition and, in some cases, post-Discharge litigation at Plaintiff's expense.

2. Post-Petition Debts Are Not Discharged in Chapter 7 Cases

(a) Plaintiff Is Not Making Any Claim to the Pre-Petition Debt

Plaintiff acknowledges that the \$450,038 Business Damages Judgment constitutes a pre-petition debt since it arose out of the parties business relationship prior to the filing of the Chapter 13 Petition.¹ Plaintiff's First Amended Complaint filed in the Adversary Proceeding does not seek a determination of nondischargeability of the Business Damages Judgment. Instead, Plaintiff's

¹ The final amount of the Business Damages Judgment remains unsettled, since the Court of Appeal remanded the issue back to the San Francisco Superior Court to recalculate the damages amount.

claims in this Adversary Proceeding are limited to debts caused by Defendant Asimos' conduct post-petition.

(b) The Contract Attorney Fee Award and the Court Costs Award Are Not Discharged

Plaintiff's judgment against Defendant Asimos in the San Francisco Action included the fees and costs he necessarily incurred in defending against the counter-suit claims and requests for attorneys' fees made by Defendant Asimos in the San Francisco Action. [JSF ¶ 6]. As set forth above, Defendant Asimos actively concealed the bankruptcy from Plaintiff and (also concealed the Trust Account monies, the San Francisco Action and his counter-suit from the Chapter 13 Trustee and this Court). This concealment caused Plaintiff to incur hundreds of thousands of dollars in attorneys' fees and litigation costs and should be deemed willful and malicious conduct such that the Contract Attorney Fee Award and the Court Costs Award be deemed not dischargeable under Section 523(a)(6).

Regardless of the applicability of Section 523(a)(6) however, Plaintiff contends that the Contract Attorney Fees Award and the Court Costs should be excluded from the scope in the Discharge Injunction altogether, since Defendant Asimos commenced litigation – post-petition – against Plaintiff and sought the recovery of attorneys’ fees against Plaintiff in the San Francisco Action. Plaintiff was required to defend against Defendant Asimos’ litigation and incurred substantial attorneys’ fees and court costs (included within the Contract Attorney Fee Award and Court Costs Award). [JSF ¶ 11, Exhibit 4 – Contract Attorney Fee Award, Exhibit 5 – Court Costs Award].

When judgment was entered against Defendant Asimos on his counter-suit and in favor of Plaintiff on his claims in the San Francisco Action, Defendant Asimos then immediately converted his Chapter 13 case to one under Chapter 7 in an attempt to include the entirety of the judgment against him in the bankruptcy (including the Contract Attorney Fee Award and Court Costs Award). [JSF ¶ 12]. Certainly, had Defendant Asimos prevailed on his counter-suit and had judgment been entered in his favor, he would have been entitled to recover his attorneys' fees incurred against Plaintiff. Yet, Defendant now claims that the Discharge shields him from the Contract Attorney Fee

1 Award and the Court Costs Award entered Against him.

2 Under the *Ybarra* line of cases, Defendant Asimos' post-petition litigation conduct mandates
3 that the Contract Attorney Fee Award and the Court Costs Award be excluded from the scope of the
4 Discharge Injunction. It is clear that Defendant Asimos affirmatively filed and prosecuted to
5 conclusion litigation against Plaintiff of his pre-petition claims after filing his Chapter 13 petition.
6 [JSF ¶ 6, Exhibit 2 – Asimos Cross-Complaint]. He also sought to recover all of his contractual
7 attorneys' fees against Plaintiff. After months of intense litigation, he lost on his claims [JSF ¶ 11,
8 Exhibit 3 – Judgment] and then tried to "shield" himself from the resulting liability by converting
9 his case to Chapter 7 [JSF ¶ 12]. Defendant Asimos should not be permitted here to use the
10 Discharge "shield" as a "sword" to undertake risk-free post-petition litigation at Plaintiff's expense.²

11 **3. Post-Discharge Debts Are Not Discharged in Chapter 7 Cases**

12 **(a) Defendant Asimos "Returned to the Fray" Post-Discharge**
13 **and Is Therefore Liable For the First Appeal Attorney**
14 **Fees Award**

15 After losing the San Francisco Action, Defendant Asimos continued pursuing litigation
16 against Plaintiff by way of the First Appeal, seeking not only to overturn the judgment against him
17 but seeking to have a judgment affirmatively in his favor and against Plaintiff substituted in its place.
18 Notably, the First Appeal was filed after the conversion of his bankruptcy case to one under Chapter
19 7. [JSF ¶ 14]. In fact, Defendant Asimos opening brief on appeal in the First Appeal was not even
20 filed until 4 months after the Discharge was entered. [JSF ¶ 17].

21 Defendant's opening brief on appeal and reply brief make it abundantly clear that Defendant
22 Asimos was not only seeking to have the Business Damages Judgment, Contract Attorneys' Fees
23 Award and Court Costs Award reversed, but was in fact seeking an affirmative judgment in favor
24 of Defendant Asimos for his damages related to his breach of contract action, which would include
25 his attorneys' fees and costs. As Defendant argued in his Opening Brief:

26 ² Plaintiff is unaware of any case law having addressed the specific factual situation presented in this case,
27 namely where a debtor undertakes litigation post-Chapter 13 petition and subsequently converts the case to
28 Chapter 7 after judgment is rendered. Plaintiff asserts that the subsequent conversion to Chapter 7 should
not be a permitted exception to the rule set forth in *Ybarra* and *Siegel*. Such a result would encourage Chapter
13 debtors to engage in post-petition litigation against creditors knowing that they will be allowed to
discharge any subsequent attorney fee award against them by way of Chapter 7 conversion if they lose.

As such, the decision below finding breach of contract by Asimos and associated attorneys' fees, costs and interest must be vacated . . . ***and judgment entered in favor of Asimos on his breach of contract action and action for an accounting.***

[JSF ¶ 17, Exhibit 7 – Opening Brief at p. 67 (emphasis added)].

Plaintiff incurred substantial attorneys' fees defending against the First Appeal.³ Plaintiff's efforts were successful as Plaintiff was determined to be the "prevailing party" on appeal. His attorneys' fees were subsequently awarded to him as the First Appeal Attorney Fee Award in the amount of \$74,911.50. [JSF ¶ 21]. The entirety of the First Appeal Attorney Fee Award arose post-Discharge and therefore should be excluded from the scope of the Discharge Injunction.

(b) Defendant Asimos' Post-Discharge Conduct Resulted in The Contempt Judgment Against Him

Defendant Asimos' post-Discharge conduct did not stop there. He continued to resist Plaintiff's legitimate efforts to enforce the Permanent Injunction despite the fact that he was not relieved from his obligations to comply with the Permanent Injunction by the Chapter 7 Discharge. Indeed, Defendant Asimos' refusal to comply by the requirements of the Permanent Injunction all arose post-Discharge which, in turn, required Plaintiff to initiate contempt proceedings against him in order to have the Permanent Injunction enforced and the Trust Account monies released to Plaintiff. As set forth above, Defendant Asimos was found guilty of contempt of court, beyond a reasonable doubt. [JSF ¶ 22; Kyle Decl. ¶¶ 8-32].

Plaintiff incurred, and was awarded \$62,785.37 in attorneys' fees pursuant to the Judgment of Contempt, all of which was necessary to compel Defendant Asimos' compliance with the Permanent Injunction requiring him to sign papers necessary to allow the release of the settlement monies in the Trust Account from the Contra Costa Action to Plaintiff. [JSF ¶ 22]. Since all of this conduct arose post-Discharge, the Judgment of Contempt and the related attorney fee award should be excluded from the scope of the Discharge.

³ It is important to recognize that Plaintiff was forced to defend the First Appeal since the appeal was not limited to a request of reversal, but rather Defendant Asimos further sought to have a judgment affirmatively entered in his favor on the underlying dispute. If Plaintiff elected to not defend against the First Appeal, he would have risked a the likely possibility that a judgment would have been entered against him.

(c) The Second Appeal Attorney Fee Award

After entry of the Judgment of Contempt, Defendant Asimos then filed another appeal (the “Second Appeal”) specifically challenging the attorney fee award related to the Contempt proceedings. [JSF ¶ 26]. Defendant Asimos lost the appeal, and subsequently Plaintiff was awarded an additional \$55,808.00 in attorneys’ fees (the Second Appeal Attorney Fee Award) as the prevailing party on appeal. [JSF ¶ 30]. The entirety of the Second Appeal took place well after the Discharge had been entered. As such, the Second Appeal Attorney Fee Award should be excluded from the scope of the Discharge.

C. Plaintiff Is Also Entitled To A Determination That Defendant Asimos' Debt to Plaintiff Is Not Dischargeable Pursuant to 11 U.S.C. §523(a)(6))

Section 523(a)(6) prevents discharge “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6). The Supreme Court in *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57 (1998), made clear that section 523(a)(6) applies where the actor intends the consequences of the act. *Id.* at 60. Here, willfulness and maliciousness are present with respect to Defendant Asimos’ conduct.

1. Defendant Asimos' Violation of the Permanent Injunction was Willful and Malicious

Failure to comply with court directives in an injunction satisfies the condition of willful and malicious within 11 U.S.C. 523(a)(6). *McDowell v. Stein*, 415 B.R. 584, 600 (S.D. Fla. 2009)(citing *In re Allison*, 176 B.R. 60, 64 (Bankr. S.D. Fla. 1994)]. In *In re Allison*, the bankruptcy court held that a state court contempt judgment, entered upon a finding that the debtor had violated a temporary injunction, was non-dischargeable under section 523(a)(6). Just as the debtor in *In re Allison* violated a court-ordered temporary injunction, Defendant Asimos violated the court-ordered Permanent Injunction. Failure to comply with this court directive satisfies the willful and malicious requirements of 11 U.S.C. § 523(a)(6). *Indeed, the trial court made specific findings that Defendant Asimos had knowledge of the Permanent Injunction and “willfully failed to comply with the Permanent Injunction.* [JSF ¶ 25, Exhibit 10 – Judgment of Contempt at p. 2].

1 **2. The Contempt Judgment and the Second Appeal Attorney Fee
2 Award Are Not Dischargeable Under Section 523(a)(6)**

3 Because of Defendant Asimos willful and malicious failure to comply with the requirements
4 of the Permanent Injunction, the damages caused by this failure, including the Judgment of
5 Contempt attorney fee award and the Second Appeal Attorney Fee Award are nondischargeable
6 under section 523(a)(6). *McDowell* at 600.

7 Further, contempt sanctions themselves are nondischargeable under section 523(a)(6) where
8 the conduct leading to them was “willful and malicious.” *In re Suarez*, 400 B.R. 732, 740 (9th Cir.
9 2009). Here, the San Francisco Superior Court made the express finding, after consideration of all
10 of the evidence submitted in the Contempt proceedings, that Defendant Asimos was guilty of
11 contempt of court, ***beyond a reasonable doubt***, and that he “had knowledge of the Permanent
12 Injunction, was able to comply at the time of the Permanent Injunction and continued to have such
13 ability, ***and willfully failed to comply with the Permanent Injunction.***” [JSF ¶ 25, Exhibit 10 –
14 Judgment of Contempt at p. 2]. Such findings made by the trial court clearly illustrate that
15 Defendant Asimos’ conduct was willful and malicious. As such, the attorneys’ fees awarded to
16 Plaintiff pursuant to the Judgment of Contempt, as well as the Second Appeal Attorney Fee Award,
17 should be deemed nondischargeable under section 523(a)(6).

18 **3. Defendant Asimos Is Bound By the Actions Taken By His Counsel**

19 Defendant Asimos has asserted “advice of counsel” as a defense to Plaintiff’s claims that he
20 acted willfully and maliciously with respect to the state court litigation, including the Permanent
21 Injunction and the Contempt Judgment. Unfortunately for Defendant Asimos, a client routinely
22 suffers the consequences of its attorney’s errors. After all, as the U.S. Supreme Court has made
23 clear, “each party is deemed bound by the acts of his lawyer agent and is considered to have ‘notice
24 of all facts, notice of which can be charged upon the attorney.’” *Link v. Wabash R. Co.*, 370 U.S.
25 626, 634 (1962) (internal citations omitted). Thus, mistakes of counsel are chargeable to the client
26 even where the client merely relies, in good faith, on attorney advice. Defendant Asimos cannot
27 avoid liability for the actions taken on his behalf by his attorney.

28 **V. CONCLUSION**

29 For the forgoing reasons, and in the interests of justice, Plaintiff respectfully requests

that the Court grant this motion and enter an Order as follows:

(1) Declaring that Plaintiff's state court Judgment of Contempt, First Appeal Attorney Fee Award, Second Appeal Attorney Fee Award, Contract Attorney Fee Award and Court Cost Award each do not seek to impose liability on Defendant Asimos for any debt discharged in the Case;

(2) Declaring that further prosecution of the San Francisco Action against Defendant Asimos pursuant to the orders and remittiturs issued by the California Court of Appeal in the First Appeal and Second Appeal, and the subsequent orders of the trial court in the San Francisco Action, including obtaining a final judgment therein and collecting on that judgment, does not violate the Discharge injunction; and

(3) Determining that these debts are nondischargeable by virtue of the provisions of 11 U.S.C. § 523(a)(6) as a consequence of Defendant Asimos willful and malicious conduct.

Respectfully submitted,

DATED: September 30, 2020

KYLE LAW CORPORATION

By s/ Stephan E. Kyle
Stephan E. Kyle, Esq.
Attorneys for Jason Everett Thompson